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No. 95-974

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ; JAIME GUTIERREZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE JUDGMENT

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QUESTIONS PRESENTED

This brief addresses the questions posed by the Court:

1. Is there a case or controversy with respect to Respondent Yniguez?

2. Do Petitioners have standing to maintain this action?

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INTRODUCTION

This brief does not address the Petitioners' questions presented, because – despite their tortured efforts to do so – lower federal courts never should have reached the merits of this case. Instead, this brief addresses only this Court's questions regarding the appropriateness of the lower courts' exercise of jurisdiction under Article III.

Although the question of what, if any, First Amendment protection is available to a public employee who wishes to speak in a language other than English as part of her employment is certainly an important legal issue, this litigation is not the proper vehicle for this Court to resolve that issue. Indeed, no court has had Article III jurisdiction over this dispute for quite some time. The proceedings below are a testament to a single-minded determination to resolve the merits of this dispute regardless of jurisdictional defects. It would be difficult to find a decision that does more violence than do the ones in this case to the oft-cited principle that federal courts should "refrain from passing upon the constitutionality [of a state law] unless obliged to do so in the proper performance of [their] judicial function." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

The Court quite correctly identified Petitioners and Respondent Yniguez as questionable parties to litigate this dispute. Once the jurisdictional quandary posed by this convoluted litigation is sorted out, it is clear that there is no case or controversy and that the proper

disposition is for the Court to vacate the judgment and order the Complaint dismissed.

STATEMENT OF THE CASE

A. Article XXVIII.

In October 1987, Petitioners, Arizonans for Official English (AOE), an unincorporated association, and its spokesman, Robert D. Park, launched an initiative drive to amend the Arizona Constitution to designate English as the State's official language and to limit state and local government employees' work-time use of any language other than English. (Pet. App. 4a.) In November 1988, Arizona voters narrowly approved the initiative, which became Article XXVIII of the Arizona Constitution. *Id.*[1]

On January 24, 1989, the Arizona Attorney General issued a formal, published opinion in which he concluded that Article XXVIII would not affect the delivery of state services in a language other than English:

> We do not interpret [Article XXVIII] as necessitating elimination of assistance provided by government in languages other than English where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers. . . . [W]e reiterate that the provision of section 3(1)(a) [of Article XXVIII], "This state and all political subdivisions of this state shall act in English and in no other language," means that official acts of government as government shall be in English as the state's official language.

[1] The text of Article XXVIII appears at Pet. App. 60a-62a.

(J.A. 61, 71-72.) Thus, the Attorney General concluded that the provision did not prohibit all uses of non-English by state and local government. Neither the Arizona Governor nor any other state official in this litigation has taken a position with respect to the proper construction of Article XXVIII contrary to that set forth by the Attorney General.

B. The Instant Lawsuit.

1. The District Court.

Two days after passage of Article XXVIII, Respondent Maria-Kelly F. Yniguez, an employee in the Risk Management Division of the Arizona Department of Administration, sued the State of Arizona pursuant to 42 U.S.C. § 1983, in the United States District Court for the District of Arizona, seeking to enjoin enforcement of Article XXVIII and to have it declared unconstitutional under the First and Fourteenth Amendments of the United States Constitution and unlawful under 42 U.S.C. § 2000(d). (R. 1.) She filed suit even though after the passage of Article XXVIII, no one – not Yniguez's immediate supervisor, any other supervisor, or any defendant – told her to stop speaking Spanish when performing her duties. (R. 62 at 12.)

The State responded by asserting its Eleventh Amendment immunity from suit in federal court. (R. 6.) In an amended complaint, Yniguez added the Governor

of the State of Arizona, the Attorney General of the State of Arizona, and the Director of the Arizona Department of Administration. (R. 5.) A second amended complaint added then-state Senator Jaime P. Gutierrez as a plaintiff, and dropped the State as a defendant. (J.A. 55.)

In 1988, the State Defendants moved to dismiss Yniguez's claim (R. 6, 26) and in 1989, to dismiss Gutierrez's claim (R. 68) based on Eleventh Amendment immunity and the absence of a live case or controversy. (R. 30.) On February 6, 1990, the district court concluded on the merits that Article XXVIII reached a substantial amount of conduct protected by the First Amendment and that therefore Article XXVIII was overbroad and unconstitutional on its face. (Pet. App. 108a.)

In the same opinion, the district court finally acted on the State's motions to dismiss. (Pet. App. 97a.) The district court held that Gutierrez's claims against the State Defendants and Yniguez's claim against the Attorney General were barred by the Eleventh Amendment. *Id.* at 99a-101a. The court also determined that Yniguez could seek declaratory and injunctive relief against Mofford and Eden because both officials had the *authority* to enforce Article XXVIII. *Id.* at 100a. The court found no actual controversy between Yniguez and Eden, however, because Eden had not threatened to enforce Article XXVIII. *Id.* at 104a. By contrast, the Court found that Governor Mofford's statement that she intended to obey Arizona's Constitution and expected state service employees to comply with Article XXVIII sufficiently

threatened enforcement[2] to satisfy the case or controversy requirement. *Id.* at 102a-103a.[3]

Governor Mofford, an outspoken opponent of Article XXVIII, announced that she would not appeal the district court decision because she agreed with it. (Pet. App. 8a.) The Arizona Attorney General, on behalf of the State of Arizona, moved to intervene in the district court pursuant to 28 U.S.C. § 2403(b) for purposes of appealing the decision declaring a provision of the Arizona Constitution unconstitutional. (R. 93.) Petitioners also moved to intervene to appeal the district court decision. (J.A. 94.) The court denied the Attorney General's motion because Governor Mofford was a party (J.A. 141), and denied Petitioners' motion, concluding that they lacked standing under Article III of the Constitution. *Id.* at 144-48.

On April 20, 1990, Yniguez voluntarily quit her job with the State for reasons unrelated to this litigation. (J.A. at 187.)

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[2] It is ironic that the district court granted relief against Governor Mofford, because she had opposed Article XXVIII in the 1988 General Election Voter Publicity Pamphlet (J.A. 22, 38-39), and publicly instructed state employees to conduct business in whatever language is needed "to serve the public." (R. 15, Exh. 4.)

[3] The district court refused to abstain from construing Article XXVIII (*id.* at 111a), denied the State's request to certify the question of Article XXVIII's construction to the Arizona Supreme Court (J.A. 138-39), and rejected the Attorney General's narrowing construction of Article XXVIII. (Pet. App. 108a-110a.)

2. The Court of Appeals.

a. The intervention decision (*Yniguez I*).

Governor Mofford did not appeal the district court's decision. (Pet. App. 8a.) The Attorney General, on behalf of the State of Arizona, and the Petitioners, however, appealed the district court's denial of their motions to intervene and also sought to appeal the district court's decision on the merits. (J.A. 150, 162.)

In July, 1991, the court of appeals held that Petitioner AOE had standing to intervene to appeal the district court's judgment, absent an appeal by any party to the judgment, because AOE, as sponsor of the ballot initiative, had a particularized injury "distinguishable from" that of concerned bystanders. *Yniguez v. State of Arizona*, 939 F.2d 727, 732 (9th Cir. 1991) (*Yniguez I*) (J.A. 167-68). The court further held that Petitioner Park had standing because he had indicated his intention to enforce Article XXVIII through the private right of action contained in section four of the article. *Id.* at 169-70.[4] The court of appeals held that the Attorney General was judicially estopped from changing his earlier decision to seek dismissal of the three State Defendants, and therefore was precluded from appealing the district court's decision. *Id.* at 180. The court concluded, however, that 28 U.S.C. § 2403(b) gave the State the right to "make an argument

[4] By this time, Yniguez had been gone from state employment for approximately fifteen months. Because there was no other plaintiff-appellee, it is not clear against whom AOE and Park were appealing or against whom Park would enforce the act.

on the question of the constitutionality [of Article XXVIII], but [the Attorney General] is given no right to appeal as a party" (*id.* at 182), emphasizing that the Attorney General's right to argue was contingent upon Petitioners bringing the appeal. *Id.* at 183. Although the court specifically stated that it would retain jurisdiction over the appeal of the district court's decision on the merits (*id.* at 183-84), the court issued its mandate from the intervention decision on August 20, 1991. (J.A. 4.)[5]

b. The mootness decision (*Yniguez II*).

In the summer of 1991, the State became aware that Yniguez was no longer a state employee and in September 1991, the State filed a suggestion of mootness, informing the court that Yniguez had not been employed by the State since April 20, 1990. (J.A. 187.) Even though Yniguez had quit her job and never sought certification of a plaintiff class, Petitioners and Yniguez argued that the case was not moot because she had standing to challenge

[5] When Petitioners and the Attorney General appealed the district court decision, neither was technically a party. Both had been denied leave to intervene. Accordingly, the Ninth Circuit apparently anticipated that a new notice of appeal would be filed by Petitioners in the district court. *See Pellegrino v. Nesbit*, 203 F.2d 463, 468 (9th Cir. 1953) (declining to consider appellant's case on the merits because the appellant, whose motion to intervene had been denied below, was not in "a position to perfect an appeal until the question of his right to intervene for that purpose had been decided in his favor"). Thus, the court issued a mandate after resolving only the intervention issue.

the overbreadth of Article XXVIII on behalf of third parties. (J.A. 188, 194.) Further, although Yniguez never requested damages from the district court and she never appealed the district court's failure to award damages, Yniguez also argued that her ability to claim nominal damages would save the case from being moot. (J.A. 197.) In September 1992, the court of appeals issued a formal opinion rejecting the State's suggestion of mootness. *Yniguez v. State of Arizona*, 975 F.2d 646 (9th Cir. 1992) (*Yniguez II*) (Pet. App. 93a). The court of appeals adopted Yniguez's argument concerning nominal damages, holding that even though Yniguez had never requested nominal damages in the district court and the district court did not award her any damages, the "possibility that Yniguez may seek nominal damages on appeal is sufficient to prevent mootness." *Id.* at 95a.

The court acknowledged that Yniguez's nominal damage claim was contrived on appeal solely to avoid mootness:

> Although Yniguez did not previously appeal the district court's implicit denial of a request for nominal damages [which Yniguez never requested], she had no reason to seek this form of relief at the time of the district court's judgment. Only now does the State press its mootness argument. Yniguez therefore may raise the issue of nominal damages in a future cross-appeal.

Id. at n.2.

The court also suggested other methods by which Yniguez could cure mootness, such as adding a new plaintiff whose claims were not moot or proving that other individuals affected by Article XXVIII did not

pursue claims in reliance on Yniguez's continued pursuit of her case. *Id.* at 96a. The court concluded by remanding the case for further proceedings in conformity with the court of appeals' disposition. *Id.*

No mandate issued from this mootness decision, but the case was returned to the district court in light of the intervention decision (see note 4, *supra*), and Petitioners AOE and Park filed a cautionary notice of appeal, recommending dismissal because Yniguez had neither cured the mootness by requesting nominal damages nor followed the court of appeals' other suggestions for curing the mootness. (J.A. 206.) Without filing any pleading in the district court requesting nominal damages or otherwise addressing the mootness issue, Yniguez filed a notice of cross-appeal. (J.A. 209.)

In 1994, after oral argument on the merits before the court of appeals, Arizonans Against Constitutional Tampering (AACT) and its chairman Thomas Espinosa moved to intervene in the pending appeal. (Pet. App. 10a.) AACT is a self-described political action committee composed of Arizona citizens who opposed Article XXVIII.[6] *Id.* To support their intervention, AACT and Mr. Espinosa merely asserted that they were political counterparts to AOE. *Id.* at 11a. The court of appeals granted their motion to intervene in June, 1994. (J.A. 14.)

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[6] The record does not show that AACT has ever registered with the Arizona Secretary of State as a political action committee, a citizens initiative campaign committee, or in any other capacity.

c. The panel decision on the merits (*Yniguez III*).

On December 7, 1994, a panel of the court of appeals affirmed the district court's 1990 decision, declaring Article XXVIII facially overbroad in violation of the First Amendment. *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1994) (*Yniguez III*). The court rejected the narrow construction offered by the Attorney General, finding the construction at odds with the language of Article XXVIII. *Id.* at 1225-27. The court also refused to abstain from deciding the question of the amendment's construction or to certify the question to the Arizona Supreme Court. *Id.* at 1227-28. The court of appeals held Article XXVIII unconstitutional, but reversed and remanded the district court's judgment insofar as it denied Yniguez an award of nominal damages. *Id.* at 1243.

d. The en banc decision (*Yniguez IV*).

On Petitioners' suggestion for rehearing en banc, a majority of the Ninth Circuit voted to rehear the matter en banc. On October 5, 1995, a six-five majority of the en banc panel concurred in an opinion essentially identical to the opinion issued by the three-judge panel. *Yniguez v. Arizonans for Official English*, 69 F.3d 20 (9th Cir. 1995)

(*Yniguez IV*) (Pet. App. 11a).[7] The five dissenting judges would have upheld the constitutionality of the provision.

SUMMARY OF ARGUMENT

I.

The First Amendment issue posed here was too inviting for the courts below to avoid deciding merely because there was no case or controversy. This Court should not follow that same course, but should dismiss the case as moot and vacate the underlying judgment.

Respondent Yniguez was never threatened with enforcement of Article XXVIII and therefore did not suffer actual injury. Moreover, Yniguez long ago mooted this litigation by voluntarily leaving the employ of the State of Arizona. She filed her Complaint individually and sought only declaratory and injunctive relief. Once Yniguez resigned, she no longer had a continuing interest in being able to speak Spanish while performing work for the

[7] In 1992, certain Arizona elected officials and employees filed a declaratory judgment action against the State of Arizona, the Arizona Governor, and the Arizona Attorney General in Arizona Superior Court challenging the constitutionality of Article XXVIII. *Ruiz v. State*, No. CIV92-19603. The Arizona Superior Court upheld the constitutionality of the provision. On June 11, 1996, the court of appeals reversed, without analyzing the merits, deferring for reasons of comity to the decision of the Ninth Circuit in this case. *Ruiz v. Arizonans for Official English*, No. 1 CA-CV 94-0235 (June 11, 1996).

State. Thus, she could no longer legitimately seek declaratory or injunctive relief. The absence of a request for class certification doomed any claim for on-going relief.

The court of appeals' contrived effort to sustain this dispute based on a possible claim for nominal damages is inconsistent with the record in the case and incorrect as a matter of law. First, Yniguez never requested nominal damages. Nor on this record could she have received any because, as the district court found, "there is no evidence of record to establish that Yniguez's asserted injury is anything except purely conjectural and hypothetical to the extent that it stems from any private actions of the Defendants." Pet. App. 103a.

Second, there is no basis for Yniguez to receive any nominal damages as a matter of law. She has no possible claim against Petitioners because they are not state actors and did not act in concert with state actors. Her claim against Arizona fares no better because she voluntarily dismissed the State as a party. Additionally, neither Arizona nor the Governor in her official capacity is amenable to suit under 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 70-71 (1989). Finally, even if Yniguez had a colorable claim for damages, that claim is purely incidental to the request for declaratory relief and cannot alone sustain the weight of this litigation. *See Alejandrino v. Quezon*, 271 U.S. 528, 533-34 (1926). Thus, there never has been a basis for any monetary recovery in this litigation and accordingly there is no live or actual controversy underlying this litigation.

Under familiar principles announced by this Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the proper disposition of the case is now to vacate the judgments below and to dismiss the Complaint so that this litigation carries with it no collateral effects.

II.

It is equally clear that Petitioners have no standing to defend the constitutionality of Article XXVIII. This Court already has decided this issue summarily in *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, 460 U.S. 1077 (1983). In that case, the Court dismissed for lack of standing an appeal by the proponents of a state initiative that had been declared unconstitutional as a violation of the Contract Clause.

Like the initiative proponents in *Don't Bankrupt Washington*, Petitioner AOE is a citizens group that drafted and campaigned for Article XXVIII. Petitioner Park is AOE's chairman. Neither was a defendant in the suits brought by Yniguez. They intervened to appeal the district court decision. Because the State Defendants did not appeal or were not permitted to appeal, Petitioners must demonstrate that they have an appealable interest – that is, that they independently satisfy the traditional standing requirements. In this case, Petitioners cannot satisfy those requirements because their injury is one that is shared by all or a large class of citizens.

The proper representatives of the citizens are the State itself and its elected officials. If factions within the public are unhappy, "our system provides for changing

members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them." *United States v. Richardson*, 418 U.S. 166, 179 (1974). Because Petitioners were not elected to represent the citizens of Arizona, they lacked standing to pursue this appeal.

III.

Because neither Respondent Yniguez nor Petitioners are proper parties to this litigation, the question arises whether the Court nevertheless can do more than simply dismiss the Petition. The Court is not powerless to act because, even when the Court lacks jurisdiction, it "may make such disposition of the whole case as justice may require." *Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944). In this case, "justice" requires the entire case to be dismissed.

This case is moot and the general rule is that mootness justifies vacatur of the underlying proceedings. *Munsingwear*, 340 U.S. at 40. Respondent Yniguez should not be permitted to benefit from mooting the case after judgment was entered in her favor. Moreover, the decision of the court of appeals departs so profoundly from the mandate of Article III that its judgment should not be left undisturbed to the detriment of the legitimate interests of Petitioners and the voters of the State of Arizona.

ARGUMENT

I. There Is No Case or Controversy With Respect to Respondent Yniguez.

A. No Case or Controversy Exists Between the Governor and Respondent Yniguez Because She Was Never Threatened with Enforcement of Article XXVIII.

The threshold question in this case is whether a live case or controversy ever existed between Yniguez and the State Defendants, since they never threatened to enforce Article XXVIII against her. A hypothetical threat of injury is not sufficient to invoke this Court's jurisdiction. *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947). "Plaintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Article III requirement of an actual controversy allows federal courts jurisdiction to hear only cases where the threat of injury is "both 'real and immediate,' [and] not 'conjectural' or 'hypothetical.'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (quoting *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969)). *See also Lewis v. Casey*, No. 94-1511, Slip Op. at 5 (June 24, 1996) (prisoner must show actual injury; "the status of merely being subject to a governmental institution that was not organized or managed properly" is insufficient to invoke the intervention of the courts). Moreover, mere allegations that a law chills First Amendment rights is insufficient to overcome the actual injury requirement. *See Boyle*

v. Landry, 401 U.S. 77, 81 (1971) (plaintiff's First Amendment challenge to state law dismissed where plaintiffs failed to demonstrate that they were in jeopardy of suffering irreparable injury). Because there was no real or immediate threat of injury to Yniguez, no case or controversy ever existed.

The district court found that Yniguez met the Article III requirement of actual injury to the extent that she asserted an injury resulting from Governor Mofford's official actions. (Pet. App. 102a.) This finding is based on pure speculation. More likely, Governor Mofford, who adamantly opposed Article XXVIII, would have relied on the Attorney General's formal opinion, which stated that Article XXVIII did not apply to the day-to-day delivery of government services such as those provided by Yniguez. (*See* J.A. 61.) Therefore, there was no actual case or controversy between Governor Mofford and Yniguez. *See Poe v. Ullman*, 367 U.S. 497 (1961) (holding that petitioner's case seeking declaratory relief presented no justiciable controversy where the prosecutor expressly agreed not to prosecute and the state had not enforced the statute at issue for eighty years); *see also supra* note 2 (after enactment of Article XXVIII, the Governor instructed state employees to conduct business in whatever language is needed to serve the public) and argument in *amicus curiae* brief filed by U.S. English, Inc. at 8-12.

B. No Case or Controversy Has Existed Since Yniguez Voluntarily Quit Her Job While the Case Was Pending on Direct Review.

Only state officers and employees were subject to Article XXVIII. Therefore, even if there were a sufficient threat of immediate enforcement when Yniguez filed suit, that threat clearly disappeared when she quit her state employment. The Article III requirement of a live and actual controversy deprives federal courts of jurisdiction to hear moot cases. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

Once Yniguez voluntarily resigned from state employment while the case was pending on direct review, she no longer could have been threatened with enforcement of Article XXVIII. Therefore she no longer had a legally cognizable interest, if she ever had one, in obtaining a judgment declaring Article XXVIII unconstitutional. Yniguez's declaratory relief claim became moot once she voluntarily left state employment. *Golden v. Zwickler*, 394 U.S. 103 (1969) (finding plaintiffs' complaint for declaratory relief moot: "No district court, whether this Court or a federal court, has 'jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' ") (quoting *Liverpool, New York and P.S.S. Co. v. Commissioners*, 113 U.S. 33, 39 (1885)).

Moreover, Yniguez did not bring her lawsuit as a class action. As a result, Yniguez did not represent a class of employees. Nor did she demonstrate any other basis to support standing. Even though Yniguez brought a facial

overbreadth challenge, such a challenge does not confer standing to assert the claims of third parties unless the plaintiff presents an actual case or controversy and has standing herself. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Court recognized that "mere[ ] prudential considerations" (such as relaxed third-party standing in First Amendment cases) do not affect the "irreducible constitutional minimum" elements of standing, which are "an essential and unchanging part of the case-or-controversy requirement of Article III." *See also Secretary of State of Maryland v. Munson*, 467 U.S. 947, 956-57 and n.7 (1984) (classifying broader third-party standing in First Amendment cases as a "lessening of *prudential* limitations on standing") (emphasis added). Therefore, after Yniguez's interest in the enforcement of Article XXVIII ceased, she could not serve as the sole representative of parties not before the Court, and the declaratory relief claim should have been dismissed.

C. Yniguez Could Not Maintain the Nominal Damage Claim Because Article XXVIII Was Never Enforced Against Her and She Could Not Pursue a Damage Claim Against the State Under 42 U.S.C. § 1983.

The court of appeals attempted to avoid the profound mootness problem caused by Yniguez's change in circumstances by suggesting that she might seek nominal damages. (Pet. App. 94a.) Yniguez, however, never requested nominal damages from the district court, either in the first instance or when the case was returned to the district court after the decision in *Yniguez II*. Moreover,

Yniguez never had a valid claim for nominal damages, because her constitutional rights were never violated.

The district court decided only Yniguez's claim for declaratory relief. The court did not grant her claim for injunctive relief because she had not "established an enforcement threat sufficient to warrant injunctive relief." (Pet. App. 112a.) Although the court of appeals later remanded the case to the district court so that Yniguez could request nominal damages, she did not request such damages and the district court did not consider a claim for nominal damages. Following Petitioners' second cautionary notice of appeal and Yniguez's notice of cross-appeal, the court of appeals assumed jurisdiction of the appeal on the merits. But rather than acknowledging the mootness of the declaratory relief claim, the court of appeals affirmed the district court's judgment granting declaratory relief, tacking on a few paragraphs concluding that Yniguez was entitled to nominal damages. (Pet. App. 59a-60a.) The conclusion was both inconsistent with the record in this case and incorrect as a matter of law.

Although the district court found that Governor Mofford may have sufficiently threatened enforcement to justify declaratory relief, this "threat" does not constitute a violation of any rights so as to justify damages. The district court specifically noted that Yniguez's standing was limited "because there is no evidence of record to establish that Yniguez's asserted injury is anything except purely conjectural and hypothetical to the extent that it stems from any private actions of the Defendants." *Id.* Thus, *at most*, the case was based on a threatened violation, but no actual violation of Yniguez's First Amendment rights. Such a threatened violation was

insufficient to provide a justiciable controversy concerning Yniguez's nominal damage claim.

Moreover, there is no basis for Yniguez to receive any nominal damages as a matter of law. She has no possible claim against Petitioners, because they are not state actors nor did they act in concert with state actors. Her claim against the State Defendants fares no better. The Governor in her official capacity is not amenable to suit for damages under 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 70-71 (1989). Also, because Yniguez voluntarily dropped Arizona from her Complaint and Arizona was not permitted to intervene as a *party* in the court of appeals, Yniguez could not obtain damages against Arizona. Moreover, Arizona is protected under the holding in *Will*. Thus, even the court of appeals' contrived theory does not provide any basis for jurisdiction because it is well settled that, absent at least a colorable claim arising under federal law, there is no basis for asserting jurisdiction in a federal court. *See Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *Neitzke v. Williams*, 490 U.S. 319, 327 n.6 (1989). At the time the court of appeals hypothesized a claim for nominal damages in 1992, this Court already had decided *Will*. Thus, Respondent Yniguez did not have a colorable claim for nominal damages and therefore her claim for declaratory relief could not be revived after she had voluntarily allowed it to become moot.

D. The Case Should Be Dismissed Because the Nominal Damage Claim Was Clearly Incidental to the Declaratory Relief Claim and Manufactured Solely in a Misguided Attempt to Maintain a Case or Controversy.

The court of appeals should not have allowed Yniguez to manipulate the judicial process by raising a previously unasserted nominal damage claim in an attempt to maintain jurisdiction. The court of appeals should not have maintained jurisdiction over this moot case based solely on the possibility that Yniguez might assert a nominal damage claim, especially when Article XXVIII had never been enforced and when the sole plaintiff never requested nominal damages before the district court. Maintaining jurisdiction in this case allowed the federal courts to circumvent Article III limitations and resulted in the courts issuing advisory opinions. Moreover, the continued prosecution of this important case, the outcome of which may significantly affect the state government and employees, should not be left in the hands of a person never truly affected and certainly no longer threatened by the law under challenge. *Cf. Diamond v. Charles*, 476 U.S. 54, 62 (1986) (" 'The exercise of judicial power . . . can so profoundly affect the lives, liberty and property of those to whom it extends,' *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982), that the decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.' *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).")

In *Alejandrino v. Quezon*, 271 U.S. 528, 533-34 (1926), this Court dismissed as moot a senator's request that his

suspension be enjoined. Although the Court raised the possibility that the senator was entitled to back salary, the Court dismissed the entire litigation because the salary issue was not briefed and his request for mandamus was not clear as to the official against whom the mandamus for back pay should issue. *Id.* at 532-34. In much the same way, in this case, Yniguez never requested or briefed nominal damages, and therefore, as in *Alejandrino*, the possibility of a nominal damage claim that is clearly incidental to the declaratory relief claim cannot save the entire litigation from dismissal. *Alejandrino* thus dictates that "where one claim has become moot and the pleadings are insufficient to determine whether the plaintiff is entitled to another remedy, the action should be dismissed as moot." *Powell v. McCormack*, 385 U.S. 486, 499 (1969) (explaining *Alejandrino*).

Other federal courts have held that an incidental, after-the-fact nominal damage claim cannot save a moot declaratory or injunctive relief claim. For example, the Second Circuit ordered dismissal of the entire litigation as moot where declaratory and injunctive relief claims were moot. *Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971). As in the instant case, the lower court found that plaintiff's nominal damages claim precluded dismissal. *Id.* at 489. The Second Circuit disagreed:

> The basic proposition which plaintiff is seeking to establish is the unconstitutionality of the Connecticut statute. Not having found a justiciable controversy permitting a declaration, the claim for nominal damages, which is clearly incident to the relief sought, cannot properly be the basis upon which a court should find a case or controversy where none in fact exists.

Id. at 489-90; *see also Geraci v. Treuchtlinger*, 487 F.2d 590, 592 (2d Cir. 1973) (an inmate's release from prison required that his freedom of religion complaint should be dismissed as moot, even though he sought nominal monetary damages); *Fox v. Board of Trustees of State Univ. of N.Y.*, 764 F. Supp. 747, 756 (N.D.N.Y. 1991) (plaintiffs' complaint dismissed as moot; court refused to "read into plaintiffs' . . . complaint a claim for damages, nominal or otherwise, where none exists").

Allowing federal courts to preserve a moot case on appeal because of the possibility of a nominal damages claim results in federal courts deciding hypothetical cases. This case, with its tortured procedure which was based purely on conjecture as to whether Article XXVIII will ever be enforced and if so, how it will be enforced, illustrates the harm in deciding hypothetical cases that Article III is supposed to prevent.

E. AACT Lacks Standing to Litigate This Action Against Either AOE or the State.

The court of appeals permitted AACT to intervene as plaintiff-appellees in this case after the opinion on the merits (*Yniguez III*), but before the *en banc* opinion. In doing so, the court specifically noted that "in reaching [its] decision . . . , [the court] need not rely on that group's standing as a party." (Pet. App. 11a.) Because AACT never alleged that it suffered any actual or threatened injury, AACT does not have standing to maintain this action in place of Yniguez.

To pursue this action in Yniguez's absence, AACT must demonstrate that AACT or one of its members

" 'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct' of the other party." *Diamond v. Charles*, 476 U.S. at 62 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). AACT never alleged in this case that it or any of its members have suffered any actual or threatened injury as a result of either AOE's or the State's conduct. In its motion to intervene, AACT merely alleged that AACT campaigned against the ballot initiative that proposed Article XXVIII, and that AACT and AOE, the initiative's sponsor, are "political counterparts with diametrically opposed interests regarding the constitutionality of Article XXVIII." (R. C.A. 5/26/94.) Thus, AACT alleged no more than a political disagreement to support its intervention motion. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Article III requirements." *Diamond*, 476 U.S. at 63. Therefore, AACT's intervention cannot demonstrate the actual or threatened harm or the personal stake that would allow AACT to carry on this action.

II. Petitioners Lack Standing to Maintain This Action.

A. AOE Does Not Have Standing to Defend the Constitutionality of Article XXVIII Because, Among Other Reasons, AOE Is Not Authorized Under Arizona Law to Defend an Initiative in Federal Court.

AOE argues, and the court of appeals concluded, that AOE could be analogized to the legislature. (Petitioner's Brief on the Merits at 41-42; J.A. 166-68.) Thus, the court of appeals found that, as the principal sponsor of the

ballot initiative proposing Article XXVIII, AOE has standing to pursue this appeal, without the participation of the State, because AOE has standing to defend its "legislation." (J.A. 166-68.) Except on an extremely superficial level, however, the sponsor of a ballot initiative is not the equal of the legislature, whose members are elected by the people to represent them and which is specifically charged with the continuing duty of enacting laws. Because an initiative sponsor is not authorized under Arizona law to defend a state constitutional amendment enacted by its initiative and not elected by the Arizona voters to defend its initiative, AOE does not have standing to defend Article XXVIII's constitutionality in federal court.

This Court already has decided this issue summarily in previous litigation. *See The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, 460 U.S. 1077 (1983). In that case, the Court dismissed for lack of standing an appeal by the proponents of a state initiative that had been declared unconstitutional as a violation of the Contract Clause. That disposition was triggered by the Solicitor General's argument that "where the State has litigated the validity of its law and decided to acquiesce in a holding that it is unconstitutional, it is not the prerogative of private citizens to revive the law through further litigation, even if they might benefit in an abstract way by doing so." Brief of Appellee the United States of America to Dismiss or Affirm, *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, No. 82-1445 (Oct. Term, 1982). The advocacy group in that case – a self-proclaimed citizens' group that drafted and

campaigned for the initiative – is identically situated to Petitioner AOE.

Although the Court's summary disposition of that appeal is not entitled to the same stare decisis effect that a fully litigated disposition of the appeal would be, it is nevertheless controlling, absent compelling reasons not to follow it. "The precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.' " *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983). In this case, the "precise issue" decided in *Don't Bankrupt Washington* – that proponents of an invalidated state initiative lack standing to appeal when the State has decided to acquiesce in the ruling – is the identical issue presented here. *See also Meek v. Pittenger*, 421 U.S. 349, 367 n.16 (1975); Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Practice* 246-247 (6th ed. 1986).

Not only is there no reason to depart from the Court's summary disposition in *Don't Bankrupt Washington*, but the holding that self-appointed defenders of state law ordinarily lack standing to litigate is correct. Petitioner AOE is a citizens group that drafted and campaigned for Article XXVIII. Petitioner Park is AOE's chairman. Neither was a defendant in the suits brought by Yniguez. They intervened in the court of appeals. Whatever the merit of the decision to permit intervention, there is a clear difference between participation in a live controversy between the plaintiff and the State, and carrying the action forward alone after the State is no longer a party. In the former case, both Article III and prudential requirements are satisfied by the controversy between the original parties. In the latter situation the intervenor must

demonstrate that it has an appealable interest – that is, that it independently satisfies the traditional standing requirements.[8] In this case Petitioners cannot satisfy those requirements.

Petitioners can cite no "injury that is peculiar to [themselves] or to a distinct group of which [they are] a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.' " *Gladstone Realtors v. Village of Bellwood*, 441 U.S. at 100 (quoting *Warth v. Seldin*, 422 U.S. at 499). When injury is shared, the proper representatives of the citizenry are the State itself and its elected officials. If factions within the public are unhappy, "our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing

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[8] *See Boston Tow Boat Co. v. United States*, 321 U.S. 632 (1944); *Barry v. District of Columbia Bd. of Elections*, 580 F.2d 695, 697-98 (D.C. Cir. 1978); *United States v. Imperial Irrigation District*, 559 F.2d 509, 521 (9th Cir. 1977), *rev'd in part and vacated in part sub nom. Bryant v. Yellen*, 447 U.S. 352 (1980); Stephen M. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 753-54 (1968).

In *United States v. Imperial Irrigation District*, the court of appeals permitted a group of intervenors to appeal in an action brought by the government, after the government had decided not to appeal. 559 F.2d at 521. Although this Court upheld the intervenors' standing to appeal. *Bryant v. Yellen*, 447 U.S. at 365-68, it pointed out that the intervenors' "interest is not 'shared in substantially equal measure by all or a large class of citizens,' . . . because [they] are residents of the Imperial Valley who desire to purchase the excess land for purposes of farming." 447 U.S. at 367 n.17. In the instant case, Petitioners' interest is not unique.

duties committed to them." *United States v. Richardson*, 418 U.S. 166, 179 (1974).

Although this Court has acknowledged that a state legislature can have standing to appeal a judgment declaring a state statute unconstitutional, the Court also recognized that the legislature's standing depends on its authority under state law to defend the constitutionality of legislation in federal court. *Karcher v. May*, 484 U.S. 72, 82 (1987). Arizona law recognizes the right of its citizens to legislate, Ariz. Const. art. IV, pt. 1, § 1, and the rights and duties of the sponsors of a ballot initiative are set forth in Arizona statutes. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 19-111 (sponsor must file an application with the Secretary of State); 19-122 (Secretary of State must provide the sponsor with a written statement of reasons for rejecting his petition). The rights and duties of the initiative sponsor, however, relate only to the period before the initiative is approved by the voters. Arizona law does not authorize an initiative sponsor to defend an initiative that has been enacted into law.

Any analogy between the initiative sponsor and the legislature is flawed. The initiative sponsor, unlike members of the legislature, is merely a vehicle for placing a proposal before the voters; the voters do not elect the initiative sponsors and by voting for the initiative, do not authorize an initiative sponsor to act for them. Indeed, if parallels are drawn, an initiative sponsor – who in Arizona drafts the proposed legislation and collects the requisite number of signatures to secure its placement on the ballot – is more analogous to legislative staff and the registered voters are more analogous to the legislative body. Therefore, the court of appeals erred in concluding

that an initiative sponsor, like the legislature, has standing to appeal the district court decision declaring Article XXVIII unconstitutional.

B. AOE's Members Do Not Have Standing to Maintain This Action and Therefore AOE Does Not Have Representative Standing.

AOE argues that it has standing by virtue of its representation of the Arizona voters who voted in favor of Article XXVIII. But AOE possesses standing to bring suit on behalf of its members only if its members would otherwise have standing to sue in their own right. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). AOE's members do not have standing to maintain this action individually, and thus AOE lacks representational standing.

Individual Arizonans who voted in favor of Article XXVIII do not have standing to defend the initiative in federal court. Any alleged harm that results from the lower courts declaring Article XXVIII unconstitutional is a " 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," a grievance that does not support exercise of this Court's jurisdiction. *Warth v. Seldin*, 422 U.S. at 499. And, unlike the Petitioners in *Coleman v. Miller*, 307 U.S. 433, 438 (1939), who consisted of all the senators who had voted for a bill who sought to keep their votes from being nullified, AOE does not consist of all of the Arizona citizens who voted in favor of Article XXVIII. Thus, AOE, like the individual voters, would not have standing based on a claim of voter nullification.

Finally, an individual member of AOE does not have standing based on the member's threat to enforce Article XXVIII. The court of appeals found that Petitioner Park, the chairman of AOE, had standing apart from AOE based on the private right of enforcement conferred in Article XXVIII, § 4 and specifically found that there was more than a speculative threat that Park might bring an action to enforce Article XXVIII against Yniguez. (J.A. 169). Whatever the merit of this speculative argument at the time it was made, it plainly cannot survive now. Yniguez is no longer a state employee and, thus, whatever threat existed ended in April 1990 when Yniguez resigned. Therefore, Park, like Arizona citizens who voted in favor of Article XXVIII, does not have individual standing to maintain this action against Yniguez.

C. AOE Has Not Suffered Injury Under Traditional Criteria.

AOE also argues that the time and money it spent promoting the initiative satisfy the injury requirement under Article III. This harm is too indirect to satisfy Article III. *See Diamond v. Charles*, 476 U.S. at 70 (petitioner's liability for attorney's fees in lower court does not confer standing to challenge abortion law because the liability for fees is a consequence of petitioner's decision to intervene, but could not be traced to the Illinois abortion law). AOE's efforts were designed to put Article XXVIII on the ballot and to persuade voters in Arizona to enact it. Those goals were fully satisfied when AOE's proposed initiative was placed on the ballot and then enacted into law by the Arizona voters. This lawsuit did

not interfere with AOE's ability to get the initiative before the voters or enacted into law. Therefore, AOE's expenditure of time and money to obtain voter approval of Article XXVIII does not confer standing to defend the constitutionality of Article XXVIII.

Petitioners claim that they have suffered actual injury because AOE's members' right to privately enforce Article XXVIII under section four of the Article has been eliminated. If the Court vacates the court of appeals decision,[9] Petitioners' rights will be unaffected because AOE was not a party to the district court action and therefore would not be bound by that action. Moreover, the degree of stare decisis arising from an unappealed district court decision is insufficient to show actual injury, as the district court decision is not binding on the Arizona courts. *See Moore v. Sims*, 442 U.S. 415, 428 (1979). Standing cannot be predicated upon a mere interest in establishing legal precedent. *Imperial Irrigation Dist.*, 559 F.2d at 521.

III. The Court Should Vacate the Court of Appeals' Decision.

The court of appeals' unswerving desire to resolve this case on the merits despite the parties' absence of a continuing stake in the outcome has created a more muddled jurisdictional situation than any previously resolved

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[9] If the Court does not vacate the Ninth Circuit decision, however, AOE's members are foreclosed from filing suit to enforce Article XXVIII under section four. *See H.L. v. Matheson*, 450 U.S. 398, 406 (1981) (where the state was a party to the district court decision, the state was bound by a decision that it did not appeal).

by this Court. There are two legal problems posed here. First, does the Petitioners' lack of standing deprive this Court of all jurisdiction to take any action vis-a-vis the judgment below; and second, if not, is vacatur nevertheless an appropriate remedy in the novel circumstances posed here? The answer to the first question is "no" and the answer to the second question is "yes."

With respect to Petitioners lack of standing, the Court has long recognized that, even when it is powerless to resolve the merits of a case because it lacks jurisdiction, it nevertheless "may make such disposition of the whole case as justice may require." *Walling*, 321 U.S. at 677. Thus, the Court has authority in its discretion simply to dismiss the appeal or to decide that the underlying judgment warrants vacatur. The jurisdictional restrictions on the Court do not impose "paralysis" in this situation. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994).[10]

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[10] Even if the Court doubted its authority to do justice in the face of Petitioners' lack of standing, it still could assume Petitioners' standing for purposes of argument and hold that Respondent Yniguez's claim has become moot. The rationale for this approach is that the mootness of Respondent's claim is significantly easier to decide than the question of Petitioners' standing. This Court has assumed a principle of law on a difficult issue in order to dispose of the case on a simpler and more pointed question. *See, e.g., Norton v. Mathews*, 427 U.S. 524 (1976); *Philbrook v. Glodgett*, 421 U.S. 707, 721-22 (1975). *See also Browning-Ferris Industries v. Muszynski*, 899 F.2d 151, 155 (2d Cir. 1990) (noting the court's "practice of avoiding difficult and sweeping jurisdictional questions in favor of deciding clear-cut and narrower issues . . . "). Following that course here would allow the Court to turn directly to the issue of vacatur.

The second problem posed here by the jurisdictional defects falls somewhere between the traditional *Munsingwear* situation, where mootness arises "by happenstance" and the proper disposition is to vacate the entire case, and the *Karcher v. May* situation, where the Court was satisfied to dismiss the appeal and not vacate the underlying judgment. *See also U.S. Bancorp*, 115 S. Ct. at 391-93 (refusing to permit vacatur after voluntary settlement between parties).

The Court has set out "[t]he principles that have always been implicit in our treatment of moot cases . . . " in deciding whether vacatur is appropriate. *Id.* at 391. The Court's disposition should be "in the manner most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot." *Id.* (quoting *United States v. Hamburg-Americkische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477-478 (1916), quoting *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 302 (1892)). The mootness and general lack of justiciability of this case is a function of Yniguez's voluntary act of quitting, accompanied by "happenstance" and errors committed by the courts below. The "just" solution is, therefore, to vacate and simply wipe this sorry episode of litigation away.

The fairness of vacatur becomes plain when the circumstances giving rise to the jurisdictional problems are examined with some care. Respondent Yniguez voluntarily left the State's employ, which caused her claim to become moot. To be sure, this is not precisely the "happenstance," such as death, that creates the strongest basis for applying *Munsingwear*. Nevertheless, while Yniguez's

action may not have been motivated to affect the litigation, she nonetheless should not be permitted to benefit by her act. It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action to moot the dispute, and then retain the judgment on the basis that the mootness was not mere "happenstance."

Arizona's position in this litigation is not without its own problems. The Governor initially decided not to appeal the district court's judgment, which is what created the need to find some "defendant-appellant." To its credit, however, the State, through the Attorney General, sought to intervene after judgment to defend Article XXVIII's constitutionality. That motion was denied because the Attorney General was deemed estopped to reenter the litigation. Putting aside the issue of the reasonableness of that decision, the State did all that it could to untangle the jurisdictional problems. It came forward and offered itself as a litigant with unquestioned standing to defend the State's law and it brought the mootness issue to the attention of the court of appeals. Under these circumstances, the ends of justice are not served by allowing Article XXVIII to be declared unconstitutional and have that declaration remain unreviewed by this Court.

To be sure, a judgment is entitled to considerable respect and vacatur must be justified. *U.S. Bancorp Mortgage Co.*, 115 S. Ct. at 392. But the public interest is not served by permitting a judgment to be entered on a constitutional issue of public importance where the requirements of Article III are so cavalierly ignored and then deeming that judgment unreviewable and even

untouchable by this Court. Justice demands that the judgment be vacated and the case remanded so that the Complaint can be dismissed.

* * *

This case has followed a tortured path and, in the short run, the State of Arizona might be better served by having this Court decide the merits of the First Amendment issues posed by Article XXVIII. Certainly the resources of the State would be conserved. But the State cannot turn a blind eye to the severe jurisdictional problems posed by the case as it comes to this Court. Respondent Yniguez's claim is moot and has been for years. In that circumstance, the only proper course is to wipe the slate clean and insist that a new litigant with a justiciable interest come forward to pursue the matter afresh. Any other course might provide some immediate relief to the litigants now before the Court, but would do inestimable harm to Article III. That price is too high.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for entry of dismissal of the Complaint.

Respectfully submitted,

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